IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. DESEAN ALEXANDER BRUCE, Petitioner.	2 CA-CR 2006-0272-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-59352

Honorable Michael D. Alfred, Judge

REVIEW GRANTED; RELIEF DENIED

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P E L A N D E R, Chief Judge.

¶1 Petitioner DeSean Bruce is serving a life sentence for first-degree murder and concurrent, lesser, aggravated sentences for five counts of armed robbery and two counts of attempted armed robbery. We affirmed his convictions and sentences on appeal in 2002. *State v. Bruce*, No. 2 CA-CR 2001-0148 (memorandum decision filed July 23, 2002). In

a petition for post-conviction relief filed in 2006, Bruce asserted claims of ineffective assistance by both trial and appellate counsel. The trial court summarily dismissed the petition, and this petition for review followed. We will not disturb the granting or denial of post-conviction relief absent a clear abuse of the trial court's discretion, *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990), and we view the evidence in the light most favorable to sustaining the trial court's ruling. *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993).

¶2 On a November night in 1997, DeSean Bruce, known by the nickname "Fella," arrived uninvited at a party. With him were two male companions known only as "Grape" and "Blue." The party was at the apartment of a woman named Dena, who had known Bruce for six to eight months and had seen him on perhaps twenty to thirty previous occasions. Other guests included a woman named Adrienne, who had first met Bruce approximately a year earlier when she had dated his cousin. Adrienne testified that she had seen Bruce again only a few weeks earlier when he and "Grape" had come over to Dena's apartment.

¶3 After Bruce and his companions had been at the party for at least half an hour, two of them displayed guns and forced the eight other adults present to assemble in the living room. Bruce announced he intended to rob them and instructed them all to empty their pockets. He then "said that he was in the mood to kill somebody." When one man refused to cooperate and "smirked or something," Bruce shot him twice. Bruce was

positively identified as the shooter by both Dena and Adrienne as well as by three of the other robbery victims.

¶4 The defense theories at trial were alibi and mistaken identification. Defense counsel told the jury in opening statement that three witnesses—Bruce's mother; his younger brother Allen; and Jake Benjamin, a former coworker of Bruce's mother and a family friend—would testify that Bruce had been at home on the night in question. In addition, the defense theorized that the ability of all of the eyewitnesses to perceive and recall had been impaired by their having ingested drugs or alcohol or both before the shooting occurred.

¶5 In his petition for post-conviction relief, Bruce first claimed trial counsel had rendered ineffective assistance by failing to argue that a statement Bruce's mother had allegedly made to Jake Benjamin in support of Bruce's alibi was admissible as a prior consistent statement, made before Mrs. Bruce had any motive to fabricate evidence to protect her son. She testified that, on the night of the shooting, she had gone out to dinner with Benjamin. After dinner, they had returned home briefly so she could change into shoes suitable for dancing. Benjamin waited for her in the car. When she returned to the car, she testified, he commented about how long she had been gone, and she responded by saying that, in addition to changing her shoes, she had stopped to talk to both Allen and DeSean.

¶6 In a statement Benjamin had given before trial, he likewise claimed Mrs. Bruce had returned to the car and commented about DeSean's having been in the house with

Allen. The state moved in limine to prevent Benjamin from testifying to that hearsay statement. It is unclear from the record whether the court explicitly ruled on the motion beyond apparently agreeing with defense counsel's statement that precluding Benjamin from testifying to what Mrs. Bruce had said "could be the ruling," thus allowing Benjamin to say only that he had gotten a response when he "spoke to her jokingly about being very slow." Bruce now faults trial counsel for failing to argue that Benjamin's testimony about Mrs. Bruce's comment, although hearsay, was admissible as a prior consistent statement.

¶7 The trial court's minute entry dismissing the petition for post-conviction relief does not state the factual or legal basis for its ruling. It appears, however, that Bruce established neither of the two requirements for a colorable claim of ineffective assistance of counsel by failing to show affirmatively "(1) that counsel's performance fell below an objective standard of reasonableness as defined by prevailing professional norms and (2) that this deficient performance resulted in prejudice to the defense." *State v. Rosario*, 195 Ariz. 264, ¶ 23, 987 P.2d 226, 230 (App. 1999). To show prejudice,

> [t]he defendant must show there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different and that they had an actual adverse effect on the defense; it is not enough to show that . . . counsel's errors had some conceivable effect on the outcome of the proceeding. If an ineffective assistance of counsel claim can be rejected for lack of prejudice, we need not inquire into counsel's performance.

State v. Whalen, 192 Ariz. 103, 110, 961 P.2d 1051, 1058 (App. 1997) (citation omitted).

¶8 The trial court could readily have concluded Bruce failed to show prejudice because Benjamin's testimony confirming Mrs. Bruce's statement to him would not have affected the outcome at trial. Given the positive identification of Bruce as the shooter by two women who had known him for at least six months and by three other witnesses who had had ample opportunity to observe him at the party before and during the armed robbery, the proffered testimony from a family friend purporting to bolster the alibi testimony of Bruce's obviously interested mother seems highly unlikely to have changed the jury's verdict at trial.

¶9 As the state noted in its response to the petition below, Mrs. Bruce was able to testify on direct examination that she had told Benjamin about having found both of her sons at home when she went in to change her shoes. The excluded hearsay testimony Bruce considers crucial would have corroborated only that single statement of his mother's. On cross-examination, the prosecutor did not challenge Mrs. Bruce's claim that she had made such a statement to Benjamin. Instead, the state focused on her failure to have mentioned to any of the police officers who had questioned her in 1997 that DeSean had been at home on the night of the shooting. She agreed that the first time she had ever told anyone about his alibi had been approximately two months before trial in 2000 and that the person she had first told was employed by the defense.

¶10 Moreover, despite her alibi testimony, Mrs. Bruce supplied other evidence that seriously undercut her son's claim that both trial and appellate counsel had prejudiced his

alibi defense. Although maintaining DeSean had been at home asleep in his bed when she returned at 1:00 or 1:30 on the morning of November 8, she also acknowledged her discovery the next morning that he had departed unexpectedly overnight, packing nothing and leaving his prized car behind in her driveway. Within days, DeSean called her from California but "wouldn't" or "couldn't" tell her where in the state he was. She did not see him again for roughly a year, until after his arrest in California.

¶11 In sum, even had trial counsel's performance fallen below a prevailing professional standard of care, which Bruce did not establish, the record amply supports a finding that he sustained no prejudice. The evidence against him was substantial, and his mother's potential motive to help her son was obvious. We thus presume the trial court found Bruce's ineffective assistance claim failed because he could not prove prejudice resulted from trial counsel's failure to advance the prior-consistent-statement argument in seeking admission of Benjamin's hearsay testimony. Bruce failed to show that the trial court would have found a prior-consistent-statement argument persuasive even had one been advanced or that this court would have overturned the trial court's evidentiary ruling on appeal. Ultimately, given the considerable direct evidence against Bruce, the trial court easily could have found it all but inconceivable that the jury would have instead accepted his alibi defense had only Jake Benjamin been permitted to corroborate a single statement by Bruce's mother, placing Bruce at home on the night of the crimes.

¶12 In the remaining issue, Bruce contends appellate counsel was ineffective for not "seek[ing] review of the State's repeated, unjustified and unjustifiable introduction of highly prejudicial gang-involvement testimony throughout the trial." But the record supports the trial court's presumed finding that the various references or allusions to gang affiliations at trial were not so prejudicial that they denied Bruce a fair trial or constituted fundamental error. By extension, if this court therefore would not have reversed the convictions on that ground even had counsel raised the issue, Bruce's claim of ineffective assistance of appellate counsel necessarily fails.

¶13 Having read the entire record, we do not find the several references to gangs to have been so prominent, so numerous, or so gratuitous as to have clearly prejudiced the jury. Most significantly, it was defense counsel, not the prosecutor, who introduced the topic first to all prospective jurors on voir dire and then to the impaneled jury in his opening statement. During voir dire, after asking whether any jurors would be unduly influenced by evidence of drug use by some of the witnesses, defense counsel stated:

> Okay. The other question that I'd like to talk to you about, mention to you briefly, is that there may be some mention about gangs in this case. This isn't a gang case. But it may be that gangs will be mentioned. And just by virtue of the fact that gangs are mentioned will that cause you any kind of a bias against Mr. Bruce? Not whether it's a gang case, but just by virtue of the fact gangs may be mentioned at some point in the testimony is that going to cause a problem as far as judging the guilt or innocence of Mr. Bruce based on the testimony that comes in from the witness stand?

¶14 The prosecutor, in his opening statement, made no direct reference to gangs or gang involvement. In what was arguably an indirect reference, the prosecutor stated:

> When [Bruce] came in the apartment he was spoiling for some kind of trouble. In the beginning when he came into this apartment, young man by the name of Leslie T[.], this defendant is having problems with Leslie T[.]. You know why? The only reason that he had problems with Leslie T[.] that night, the color of the clothes that Leslie T[.] had on. [Bruce] took exception to that. He was wearing red. And that angered [Bruce] as well. And he didn't like that.

¶15 It was defense counsel, however, who then made the statement that Bruce complained about below and mistakenly attributed to the prosecutor:

> Now, at some point in time and this is probably between 12 and 1 o'clock, the three gentlemen come into the apartment that are known as Fella, Grape and Blue. There are some questions in the course of the thing where they are hearing about the possibility of gangs and things of that nature. And you will find in during [sic] the course of this trial that the gentleman named Grape has got a huge tattoo on his arm that says Watts and Grape on it. It's a gang tat[t]oo. That's exactly what it is. And so the connection between LA and gangs becomes prominent to anybody that's at the p[a]rty because they can see the tat[t]oo on his arm.

Not only did Bruce wrongly ascribe the statement to the prosecutor in his petition for post-conviction relief, but the mistake persists in the petition for review, even after the state called attention to the error in its response to the petition below.

¶16 The state argued below that appellate counsel was not ineffective for failing to raise this issue on appeal because the occasional references to gang membership at trial had been properly admitted. The information was relevant and material, the state argued,

to explain how Bruce and two companions had been able to intimidate and control a group of eight adults and why most of the victims had acquiesced to their demands. Determinations of the relevance and admissibility of evidence rest in the trial court's discretion. *See State v. Rutledge*, 205 Ariz. 7, ¶ 15, 66 P.3d 50, 53 (2003). We presume the trial court found its initial evidentiary rulings had been appropriate and thus concluded appellate counsel could not have been ineffective for failing to challenge the rulings on appeal. The record reasonably supports such a conclusion.

¶17 Even had Bruce made a colorable showing that appellate counsel fell below the applicable standard of care by not raising the issue on appeal, it is evident that Bruce could not have proven the prejudice necessary to a successful claim of ineffective assistance in any event. *See generally Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984); *Whalen*, 192 Ariz. at 110, 961 P.2d at 1058. Bruce contends the various references at trial to gang involvement were not only irrelevant, "highly inflammatory," and prejudicial, but were designed only to "plant more and more firmly in the mind of the members of the jury the idea that DeSean Bruce was a Crip, a gang member, a person of dangerous character who acted on the night in question in conformity with that character" and "who needed to be taken off the street" for the protection of the public.

¶18 We fail to see the potential for any significant prejudice. Bruce's defense was not that someone else had shot the victim at a party where Bruce was also present; had it been, then his argument—that the gang references at trial improperly invited the jury to

assume he had merely acted in conformity with his dangerous character—might have had some traction. But the defense Bruce chose to assert was his claimed alibi that he had not been at the party where the shooting occurred and had instead been home all evening, as his mother and his brother both testified. Had the jury believed the claim that Bruce had been at home, then whether he was or was not a gang member and whether he associated with people who were in gangs would have been wholly immaterial and thus not prejudicial.

¶19 Given the testimony of five witnesses that Bruce was the person who had shot the victim in their presence, evidence of gang involvement had little capacity to affect the outcome in this case. Either the jury believed the five eyewitnesses who were present in the room and said they saw Bruce shoot the victim or they believed Bruce's mother and brother that Bruce did not commit, and could not have committed, the crimes because he was at home when they occurred. Evidence of his affiliation with a gang was inconsequential in either case. Under the particular facts and circumstances of this case, therefore, we fail to see how Bruce could establish actual prejudice to his defense. As a result, his claim of ineffective assistance of appellate counsel lacked merit, and the trial court did not abuse its discretion by dismissing the petition for post-conviction relief without a hearing.

¶20 Although we grant the petition for review, we deny relief.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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GARYE L. VÁSQUEZ, Judge